

STATE OF MICHIGAN
COURT OF APPEALS

MALIK TOSA,

Plaintiff-Appellee/Cross-Appellant,

v

GEORGE YONO,

Defendant/Third Party Plaintiff-
Appellant/Cross-Appellee,

and

JAMAL ODEESH and ATEF ASMARO,

Third-Party Defendants.

UNPUBLISHED

March 18, 2008

No. 274301

Wayne Circuit Court

LC No. 05-516265-NO

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant George Yono appeals by leave granted the trial court's order denying his motion for summary disposition on the issue of premises liability. Plaintiff Malik Tosa cross-appeals the trial court's order granting Yono's motion for summary disposition on the issues of general negligence and nuisance. This case arises out of an incident when a stray dog confronted Tosa and he allegedly fell on a defective condition located on Yono's property. We reverse in part and affirm in part.

I. Basic Facts And Procedural History

At all times relevant to this case, George Yono was the owner of a commercial property located on West Seven Mile in Detroit, Michigan. Yono also owned the building that was located on the property. Yono leased space in the building to Jamal Odeesh, who used the space to operate a restaurant. A parking lot area that was located directly in front of the building provided parking for patrons of the restaurant.

According to deposition testimony, on August 13, 2004, Tosa was a patron of the restaurant and parked his car in the parking lot provided. Upon leaving the restaurant, Tosa headed back to his car. But just as he was about to open the door of his car, a stray dog confronted him. Tosa attempted to back away from the dog, but his shoe got stuck in a crack in

the pavement of the parking lot, causing him to fall. As a result of the fall, Tosa suffered injuries to his wrist and shoulder. Tosa suffered no direct injuries from the dog, which ran away after Tosa fell.

Tosa filed a complaint, alleging that Yono was aware that stray dogs would wander through the parking lot, creating a dangerous and hazardous condition for the patrons of the restaurant. Therefore, Tosa alleged that Yono failed to fulfill his duty to provide a safe parking area by failing to fence off or guard the parking lot. Deposition testimony indicated that the dogs were attracted to a garbage dumpster near the restaurant. In his amended complaint, Tosa further alleged that Yono created a public nuisance by allowing stray dogs to run through the parking lot and attack patrons, and that Yono “unreasonably interfered with the common right enjoyed by the general public, including such individuals as [Tosa], to ingress and egress from not only their vehicles, but also through the parking lot and into the restaurant.”

Yono filed two motions for summary disposition. In the first motion, he argued that the trial court should dismiss Tosa’s public nuisance claim under either MCR 2.116(C)(8) or (C)(10). More specifically, Yono argued that Tosa’s public nuisance claim was unenforceable as a matter of law because a single alleged incident between a stray dog and one person in a parking lot owned by a private individual simply did not rise to the level of public nuisance, which, Yono argued, required a showing of interference with common rights shared by the public at large. Yono further argued that there was no genuine issue of material fact that a single alleged attack by a stray dog did not constitute an “unreasonable interference” with a public right because the condition was not of such a continuing nature to produce permanent or long-lasting effects. In his second motion, Yono argued that the trial court should dismiss Tosa’s general negligence and premises liability claims under MCR 2.116(C)(10). More specifically, Yono argued that there was no genuine issue of material fact that he had no notice of the crack on which Tosa allegedly fell. Yono also argued that the crack was an open and obvious condition, noting that a crack in the surface of a parking lot is a common, everyday occurrence. And, citing an unpublished decision of this Court,¹ Yono asserted that the presence of the stray dog was not a special aspect that would negate the open and obvious nature of the crack in the parking lot. Yono also contended that, pursuant to his lease agreement with Odeesh, he had no duty to maintain the premises.

Notably, in responding to Yono’s motions for summary disposition, Tosa stated as follows:

The Plaintiff . . . never alleged other than the fact that he was caused to have tripped in a pot hole in the parking lot, that the dangers ensued were caused by a pothole. The Plaintiff’s injuries in this case were solely the result of being attacked which caused him to attempt to flee an attacking dog, wherein he was

¹ *Brooks v Burger King Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2005 (Docket No. 252576), slip op p 3 (“The presence of the wild dogs on the premises also cannot qualify as a special aspect.”).

caused to have tripped, lost his footing, and fell to the ground, and caused him to suffer this injury.

Accordingly, Tosa argued that the open and obvious doctrine did not bar his claim for nuisance. Tosa acknowledged that to support his public nuisance claim he had to demonstrate that his harm differed from that of the general public; thus, he argued that he had “shown that his harm was different than the general public in that he has shown that he was literally attacked by this wild dog, and as a result, while attempting to flee, fell to the ground and suffered horrible injuries[.]”

At the hearing on the motion, the trial court asked Tosa’s counsel to comment on the negligence claim, and counsel responded as follows:

[T]his is not a slip and fall case. This is more. I don’t think in our complaint we allege slip and fall. I think originally what we claimed they [sic] should have had a fencing guarding the premises. The fact he backed up and hit a hole tripped, fell and injured himself is a fact but this is not your “premises liability claim.”

The general liability claim interestingly enough since there is no open and obvious defense, there is no open and obvious claim in a nuisance claims so when once both of those claims—this argument of open and obvious doesn’t apply.

* * *

[W]e are not alleging that the [sic] fact he tripped in a hole. The fact is he was being chased by a dog. He was backing up and he fell. He could have fallen without that hole. The fact is this was a premises, this was a general liability case filed for in the beginning because our claim was a failure to maintain a safe premises and then we added the nuisance claim.

Following the hearing, the trial court granted Yono’s motion for summary disposition on the claims for general negligence and nuisance. However, the trial court ruled that the case “survives on the premises case.” The trial court explained its ruling on the general negligence claim by drawing an analogy between stray dogs and criminal activity, concluding that the landowner had no duty to protect patrons from injuries by third parties, “including animals alone.” The trial court further reasoned that “[p]ublic nuisance can originate from private land like parking lots but the impact of the nuisance must be on the general public, the community at large . . . , not a specific subset of people such as restaurant customers[.]” Turning to the issue of premises liability, the trial court noted that the primary case on which Yono relied was an unpublished case and, thus, not binding. The trial court reasoned as follows:

This Court does not believe that a man chased by a pack of wild dogs can be expected to notice or protect against a depression in the sidewalk as a matter of law. The Court of Appeals stated alternative routes were available but the pedestrian as seen from an objective perspective who was fleeing a pack of wild dogs has a chance to take or even apprehend [sic] an alternative route.

The Court of Appeals separated the hazard . . . from the context, the chased by the pack of wild dogs but the hazard was not just the depression itself. The hazard was the depression in conjunction with the pack of dogs and significantly the owner was aware of the dog problem.

Yono now appeals the trial court's ruling on the premises liability issue, and Tosa cross-appeals the trial court's ruling on the issues of general negligence and nuisance.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's ruling on a motion for summary disposition.² Where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked beyond the pleadings, we "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."³ Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The moving party must specifically identify the undisputed factual issues, and support its position with affidavits, depositions, admissions, or documentary evidence.⁴ When reviewing the motion, a court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁵

B. Premises Liability

Although his complaint seemingly sounded in premises liability, Tosa repeatedly denied that he was alleging a premises liability claim. Instead, he insisted that he intended to bring the claim under the theories of general negligence and nuisance. To that end, Tosa clarified that he was not claiming that he was injured as a result of the defect in the surface of the parking lot, specifically stating that his injuries "were solely the result of being attacked which caused him to attempt to flee an attacking dog[.]" and that "[h]e could have fallen without that hole." Accordingly, we conclude that the trial court erred in continuing the action under a theory of liability that Tosa specifically disclaimed.

Indeed, to the extent Tosa's complaint could be construed as asserting a claim under the theory of premises liability, we find *Brooks v Burger King Corp* persuasive.⁶ In that case, while

² *Stopczynski v Woodcox*, 258 Mich App 226, 229; 671 NW2d 119 (2003).

³ *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

⁴ MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁵ MCR 2.116(G)(5); *Maiden*, *supra* at 120.

⁶ An unpublished opinion has no precedential value. MCR 7.215(C)(1). But when a party chooses to cite an unpublished opinion, a court may follow that decision if it finds the reasoning persuasive. See *People v McCullum*, 172 Mich App 30, 33; 431 NW2d 451 (1988); *Plymouth Stamping v Lipshu*, 168 Mich App 21, 27-32; 424 NW2d 530 (1988), *aff'd* 436 Mich 1 (1990).

running from a pack of wild dogs, the plaintiff fell on a sewer grate depression in the pavement of a parking lot.⁷ The panel in that case held that the depression was an open and obvious condition and also held that the presence of the wild dogs did not qualify as a special aspect. The *Brooks* panel pointed out that the presence of the wild dogs was not an aspect of danger from the pothole itself. The panel stated that “the risk of tripping while fleeing from wild dogs [was] not unavoidable. A different route could have been taken[.]”⁸

Here, the presence of the stray dog was not an aspect of danger from the crack on which Tosa tripped. The risk of tripping while attempting to back away from the stray dog was not unavoidable. Tosa could have gotten into his vehicle, or simply taken a different route. The presence of the stray dog did not qualify as a special aspect to make a small crack in the pavement of a parking lot unreasonably dangerous. Moreover, the record suggests that Tosa should have known that stray dogs frequented the parking lot. Although Tosa stated that he never actually saw a dog in the parking lot before the date of the incident, he testified that he had heard Odeesh complain about the dogs. Indeed, Odeesh testified that stray dogs and cats were a common occurrence in the area. Thus, under the circumstances, we cannot conclude that a stray dog was an “unusual” condition such as would prohibit application of the open and obvious doctrine.

Accordingly, we conclude that the trial court erred in denying Yono’s motion for summary disposition on the issue of premises liability.

C. General Negligence

To establish a prima facie case of negligence, a plaintiff must first show that the defendant owed a duty to the plaintiff.⁹ “Duty” is a legally recognized obligation to conform to a particular standard of conduct toward another.¹⁰ In the absence of a controlling statute or contract, the common law imposes on every person an obligation to use due care or to act so as not to unreasonably endanger the person or property of others.¹¹ When determining whether to impose a common-law duty, the most important factor is the relationship between the parties.¹² And the relationship between a landowner and an invitee can impose a duty on the invitor to exercise reasonable care for an invitee’s protection.¹³

⁷ *Brooks*, *supra* at slip op p 1.

⁸ *Id.* at slip op p 3.

⁹ *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005).

¹⁰ *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006).

¹¹ *Riddle v McLouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

¹² *In re Certified Question from the Fourteenth District Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007).

¹³ *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-500; 418 NW2d 381 (1988).

However, an invitor is not required to protect customers from the crimes of others, even in high crime areas.¹⁴ Therefore, a merchant is not required to provide security or otherwise anticipate and prevent the criminal acts of third parties.¹⁵ “A business invitor is not the insurer of the safety of the invitees. Although a business invitor can control the condition of its premises by correcting physical defects which could result in injuries to its invitees, it cannot control the incidence of crime in the community.”¹⁶ “To require defendant to provide [security] to protect invitees from criminal acts in a place of business open to the general public would require defendant to provide a safer environment on its premises than its invitees would encounter in the community at large.”¹⁷ “Criminal activity is irrational and unpredictable[.]”¹⁸

Although stray dogs are not criminals, we agree with the trial court that an appropriate analogy can be drawn between stray dogs and criminals. Both are undesirable and both can be dangerous, but the conduct of both is irrational and unpredictable. Thus, although a landowner owes a duty to an invitor to exercise reasonable care to protect the invitor from dangerous conditions on the land, a landowner has no duty to control the incidence of stray dogs roaming onto his property, even in an area where stray dogs are known to be a common occurrence.¹⁹ Yono was not required to provide a safer environment on his premises than the restaurant patrons would encounter in the community at large.²⁰ Therefore, we conclude that Yono had no duty to install a fence to protect Tosa from stray dogs confronting him in the parking lot.²¹

D. Nuisance

A public nuisance is an unreasonable interference with a common right enjoyed by members of the general public.²² The term “unreasonable interference” includes conduct that significantly interferes with the public’s health, safety, peace, comfort, or convenience, or is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights.²³ A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of

¹⁴ *Perez v KFC Nat’l Mgt Co*, 183 Mich App 265, 268-269; 454 NW2d 145 (1990).

¹⁵ *MacDonald v PKT, Inc*, 464 Mich 322, 325-326; 628 NW2d 33 (2001).

¹⁶ *Perez, supra* at 268.

¹⁷ *Williams, supra* at 502.

¹⁸ *MacDonald, supra* at 335.

¹⁹ See *Perez, supra* 268-269.

²⁰ *Williams, supra* at 502.

²¹ See *MacDonald, supra* at 325-326.

²² *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

²³ *Id.*

harm different from that of the general public.²⁴ To be held liable under a nuisance theory, the defendant must have either created the nuisance or have possession or control of the land.²⁵

Because Yono did not create the alleged nuisance—stray dogs roaming the neighborhood—his potential for liability could only be created by his possession of the land.

“The possessor of land upon which [a] third [party] conducts an activity that causes a nuisance is subject to liability if: (1) he knows or has reason to know that the activity is being conducted and that it causes or involves an unreasonable risk of causing the nuisance, and (2) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.”^[26]

We conclude that Yono cannot be liable for the alleged nuisance created by the stray dogs entering his property because the record does not support a finding that the animals’ presence created an unreasonable interference with a right common to the public or involved an unreasonable risk.

Tosa claimed that Odeesh told him that dogs had “attacked” him a couple times while he was in the alley behind the building. However, the record does not support that anyone, including Tosa, was ever actually “attacked” by a stray dog in the restaurant parking lot. Indeed, in an August 2004 affidavit, Odeesh testified that dogs had chased him a couple times; however, at his deposition in March 2006, Odeesh denied that the dogs had chased him, claiming only that he had seen them. Moreover, Tosa could not remember the dog barking or growling at him, and he testified that the dog did not bare its teeth at him. Tosa’s testimony indicates that the dog was simply walking slowly towards him. And, after Tosa fell, the dog ran away. Tosa conceded that despite having visited the restaurant on several prior occasions, he had never before seen any dogs in the parking lot.

Although the presence of stray dogs is an undesirable element to have in a community, there is no evidence here that the dogs’ presence created an unreasonable interference with a common right enjoyed by members of the general public or created an unreasonable risk of harm to Tosa or to the general public that would subject Yono to liability for not abating the alleged nuisance.

We affirm the trial court’s ruling granting Yono’s summary disposition on the issues of general negligence and nuisance, but we reverse the trial court’s ruling denying Yono’s motion for summary disposition on the issue of premises liability.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

²⁴ *Adkins v Thomas Solvent Co*, 440 Mich 293, 306, n 11; 487 NW2d 715 (1992); *Cloverleaf*, *supra* at 190.

²⁵ *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990).

²⁶ *Id.* at 163-164.